

## Environmental Protection Agency

## § 78.3

- (2) Under part 73 of this chapter,
- (i) The decision on a claim of error in a transfer recordation;
  - (ii) The decision on the allocation of allowances from the Conservation and Renewal Energy Reserve;
  - (iii) The decision on the allocation of allowances under regulations implementing sections 404(e), 405(g)(4), 405(i)(2), and 410(h) of the Act;
  - (iv) The decision on the allocation of allowances under part 73, subpart F of this chapter;
  - (v) The decision on the sale or return of allowances and transfer of proceeds under part 73, subpart E; and
  - (vi) The decision on the deduction of allowances under § 73.35(b) of this chapter.
- (3) Under part 74 of this chapter,
- (i) The determination of incompleteness of an opt-in permit application;
  - (ii) The issuance or denial of an opt-in permit and approval or disapproval of the transfer of allowances for the replacement of thermal energy;
  - (iii) The approval or disapproval of a permit revision to an opt-in permit;
  - (iv) The decision on the deduction or return of allowances under subpart E of part 74 of this chapter;
- (4) Under part 75 of this chapter,
- (i) The decision on a petition for approval of an alternative monitoring system;
  - (ii) The approval or disapproval of a monitoring system certification or recertification;
  - (iii) The finalization of annual emissions data, including retroactive adjustment based on audit;
  - (iv) The determination of the percentage of emissions reduction achieved by qualifying Phase I technology; and
  - (v) The determination on the acceptability of parametric missing data procedures for a unit equipped with add-on controls for sulfur dioxide and nitrogen oxides in accordance with part 75 of this chapter.
- (5) Under part 77 of this chapter, the determination of incompleteness of an offset plan and the approval or disapproval of an offset plan under § 77.4 of this chapter and the deduction of allowances under § 77.5(c) of this chapter.
- (c) In order to appeal a decision under paragraph (a) of this section, a

person shall file a petition for administrative review with the Environmental Appeals Board under § 78.3. The Environmental Appeals Board will, consistent with § 78.6, either:

- (1) Issue an order deciding the appeal; or
  - (2) Where there is a disputed issue of fact material to the contested portions of the decision, refer the proceeding to the Chief Administrative Law Judge, who will designate an Administrative Law Judge to conduct an evidentiary hearing to decide the disputed issue of fact. If the proposed decision is contested or the Environmental Appeals Board decides to review the proposed decision, the Environmental Appeals Board will issue an order deciding the appeal.
- (d) Questions arising at any stage of a proceeding that are not addressed in this part will be resolved at the discretion of the Environmental Appeals Board or the Presiding Officer.

[58 FR 3760, Jan. 11, 1993, as amended at 60 FR 17132, Apr. 4, 1995; 62 FR 55488, Oct. 24, 1997; 66 FR 12978, Mar. 1, 2001]

### § 78.2 General.

Part 72 of this chapter, including §§ 72.2 (definitions), 72.3 (measurements, abbreviations, and acronyms), 72.4 (Federal authority), 72.5 (State authority), 72.6 (applicability), 72.7 (new units exemption), 72.8 (retired units exemption), 72.9 (standard requirements), 72.10 (availability of information), and 72.11 (computation of time), shall apply to this part.

### § 78.3 Petition for administrative review and request for evidentiary hearing.

- (a)(1) The following persons may petition for administrative review of a decision of the Administrator that is made under parts 72, 74, 75, 76, and 77 of this chapter and that is appealable under § 78.1(a) of this part:
- (i) The designated representative for the unit covered by the decision;
  - (ii) The authorized account representative for an account covered by the decision; and
  - (iii) Any interested person.
- (2) The following persons may petition for administrative review of a decision of the Administrator that is

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made under part 73 of this chapter and that is appealable under § 78.1(a):

(i) The authorized account representative for any Allowance Tracking System account covered by the decision; and

(ii) With regard to the decision on the allocation of allowances from the Conservation and Renewable Energy Reserve, the certifying official whose application is covered by the decision.

(b)(1) Within 30 days following issuance of a decision under § 78.1 of this part by the Administrator, any person under paragraph (a) of this section may file a petition with the Environmental Appeals Board for administrative review of the decision. If no petition for administrative review of a decision under § 78.1 of this part is filed within such period, the decision shall become final agency action and shall not meet the prerequisite for judicial review under § 78.1(a)(2).

(2) The petition may include a request for an evidentiary hearing to resolve any disputed issue of material fact concerning the decision.

(3) At the same time that the petition for administrative review is filed, the petitioner shall:

(i) Serve a copy of the petition on the designated representative or authorized account representative under paragraph (a)(1) and (2) of this section (unless the designated representative or authorized account representative is the petitioner) and the Administrator; and

(ii) Mail a notice of the petition to the air pollution control agencies of affected States and any interested person.

(c) The petition for administrative review under this part shall state with specificity:

(1) Each material factual and legal issue alleged to be in dispute and any such factual issue for which an evidentiary hearing is sought;

(2) A clear and concise statement of the nature and scope of the interest of the petitioner;

(3) A clear and concise brief in support of the petition, explaining why the factual or legal issues are material and, if an evidentiary hearing is requested, why direct and cross-examina-

tion of witnesses is necessary to resolve such factual issues;

(4) If an evidentiary hearing is requested, the time estimated to be necessary for an evidentiary hearing;

(5) If an evidentiary hearing is requested, a certified statement that, in the event of an evidentiary hearing, and without cost or expense to any other party, any of the following persons shall be available to appear and testify:

(i) The petitioner; and

(ii) Any officer, director, employee, consultant, or agent of the petitioner.

(6) Specific references to the contested portions of the decision; and

(7) Any revised or alternative action of the Administrator sought by the petitioner as necessary to implement the requirements, purposes, or policies of title IV of the Act.

(d) In no event shall a petition for administrative review be filed, or review be available under this part, with regard to:

(1) Any provision or requirement of part 72, 73, 74, 75, 76, or 77 of this chapter, including any standard requirement under § 72.9 of this chapter and any emissions monitoring or reporting requirements under part 75 of this chapter;

(2) The reliance by the Administrator on a certificate of representation submitted by a designated representative or a certification statement submitted by an authorized account representative under the Acid Rain Program; and

(3) Actions of the Administrator under sections 112(r), 113, 114, 120, 301, and 303 of the Act.

[58 FR 3760, Jan. 11, 1993, as amended at 60 FR 17132, Apr. 4, 1995; 62 FR 55488, Oct. 24, 1997]

#### § 78.4 Filings.

(a) All original filings made under this part shall be signed by the person making the filing or by an attorney or authorized representative. Any filings on behalf of owners and operators of an affected unit or affected source shall be signed by the designated representative. Any filings on behalf of persons with an interest in allowances in a general account shall be signed by the authorized account representative. The name, address, telephone number, and